

More than “Cheap Sentimentality”: Victim Testimony at Nuremberg, the Eichmann Trial, and Truth Commissions¹

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Antjie Krog, an Afrikaner journalist who covered the South African Truth and Reconciliation Commission described her time at the hearings:

Week after week; voice after voice; account after account . . . It is not so much the deaths, and the names of the dead, but the web of infinite sorrow woven around them. It keeps on coming and coming. A wide, barren, disconsolate landscape where the horizon keeps on dropping away.²

Her words capture what many in the audience of the truth commission felt, along with those who were following the proceedings through the media – emotional exhaustion and uncertainty. These emotional responses prompted the questions: How do we make sense of the countless testimonies of grief, suffering, and loss? What purposes do they serve? Are the testimonies of victims connected to justice?

The testimony of war victims, in contrast to the testimony of a victim or family members during an individual criminal trial, is an overwhelming endeavor because of the number involved and the often complete physical and psychological devastation witnesses have faced. Asking such witnesses to testify may seem like a foray into “infinite sorrow” yet this practice has become a central element of truth commissions, as temporary institutions set up by the head of state or the United Nations to investigate the violence of a previous period. The South Africa Truth and Reconciliation Commission, the most well-known of the more than 30 truth commissions that have been set up since the late 1970s, made victim testimony central to its mission and conducted it on an unprecedented scale, allowing over 2000 people to testify at public hearings and taking statements from more than 20,000.³

Transitional justice is a term that refers to the social and legal issues that emerge after war as a society struggles to rebuild its infrastructure, economy, and political framework. The concept of victim testimony as a part of the transitional justice did not emerge only in the context of truth commissions, it was foreshadowed by experiences in the aftermath of World War II. This paper argues that the trial of Adolf Eichmann marks a watershed moment in the relationship between the experiences of victims, their impact on society, and the demands of justice in the aftermath of war and mass atrocity. In contrast to the Nuremberg trials that aimed to prosecute Nazi officials solely on the basis of material evidence, the chief prosecutor of Adolf Eichmann, Gideon Hausner, made the oral testimony of victims central to his case against Eichmann.

Not all agreed with the inclusion of victim testimony in the proceedings of criminal justice. Hannah Arendt, the person largely responsible for documenting the Eichmann trial for the international media and its most famous theoretical interlocutor, was highly critical of the prosecution’s strategy of using witnesses who could not provide direct evidence about the defendant. Further, she implied that to elicit sympathy and outrage in the judges and audience through the emotional testimony of individual suffering is not appropriate

in a criminal trial. I will argue that despite Arendt's criticisms of the victim testimony in the Eichmann case, it represented a pivotal moment for transitional justice. It was the first case of a trial in the aftermath of war to consider the emotions of victims as central to the practice of justice. By doing so, it challenged previous distinctions between reason and emotion and between the public and private spheres. The Eichmann trial, although not without serious shortcomings in procedure, laid the foundation for a new, still unrealized type of transitional justice that has the potential to address the psychological needs of a society after war. As a way of situating Eichmann between the conventional perspective of criminal justice after war and new frameworks for understanding justice, I place it on a theoretical continuum between the Nuremberg trials and the South African Truth and Reconciliation Commission and find that truth commissions are part of Eichmann's legacy and build upon the centrality of victim testimony to aspire to a more comprehensive vision of transitional justice.

The Nuremberg Trials

The Nuremberg trials are the most influential trials of post-war justice in the 20th century. Conducted between 1945–1948, they established the precedent that would later be used to form the International Criminal Court and gave an institutional framework to the principle that crimes committed during war would fall under an international jurisdiction and that perpetrators of crimes such as “crimes against humanity” could be held accountable.⁴ The representatives of the Allied forces who were the architects of the trials at Nuremberg were concerned about being charged with offering “victor's justice,” a trial that serves merely as a facade for the victors to impose punishment and retribution on their vanquished foe. Instead they wanted to be seen as offering a new model for international justice, one that was based on international law and an impartial method of judgment. To that end, the language used by the judges and the prosecutors at Nuremberg was meant to mute the centrality of vengeance and retribution in the rhetoric of the trial in order to focus on more narrow concerns of criminal responsibility. The actions of the International Military Tribunal would show in word, as well as legal procedure, that it represented a more just political structure than the one of Nazi Germany and this included emphasizing the rationality of the charges, rules of evidence, and protections for the defendants.

Robert Jackson, the American Supreme Court justice who served as the chief prosecutor at Nuremberg, most clearly embodied this vision of an impartial and rationalistic approach to transitional justice after war. In his opening statement he articulates that an American lawyer is the best suited to lead a dispassionate inquiry into war because his country did not experience the material devastation of the European allies and that he, in particular, is an appropriate candidate for the job of chief prosecutor because he is able to separate his anger towards the defendants from his legal obligations. Both of these justifications for the legitimacy of American leadership in the prosecution stem from the belief that an emotional predisposition to anger or vengeance has no place in a criminal trial and that the separation of rationality from emotion is the mark of a just and legitimate trial.

This philosophy carried over into the strategy for providing evidence that would show the individual accountability of the 24 Nazi officials on trial, including Hermann Göring, the commander of the Luftwaffe, Albert Speer, architect and Minister of Armaments, and Hans Frank, Governor-General of occupied Poland. They were charged with planning, initiating, and waging wars of aggression and crimes against humanity, and the defense against these charges was based on the claim that the defendant either did not know the extent of the crimes

that were committed in the name of the Third Reich, or was simply following orders within a regime that did not allow for individual autonomy in deciding whether or not to carry out such orders.⁵

The prosecution, under Jackson's leadership, considered using the testimony of victims to establish the extent of the crimes and the direct complicity of the defendants because they thought this approach would be a dramatic way to hold the international media's attention while also portraying the Allies as empathetic towards the experiences of victims and survivors. In the end, however, the prosecution decided *not* to use the testimony of victims and chose only to rely on material evidence in the form of documentation of invoices, communication, and photographs in order to provide a straightforward paper trail of the case, one that would not be open to criticism directed towards the credibility of victim testimony. By not including victim testimony as part of their strategy, the prosecution was able to further emphasize the idea that their inquiry was based on an impartial, objective account of the specific crimes of Nazi officials during and leading up to the Second World War. In his opening statement Jackson outlines the systematic anti-Semitic practices of the Nazi party and the structures put into place for the elimination of as many Jews as possible and he says, "I shall not take the time to detail the ghastly proceedings in these concentration camps. Beatings, starvings, tortures, and killings were routine – so routine that the tormentors became blasé and careless[sic]"⁶. This statement encapsulates Jackson's orientation to the particular experiences of victims during the trial: they are central to the case because they show the extent of the crimes committed, but there is no need to spend time and effort detailing the particularities of suffering.

Although it occurred shortly after the end of the war, the prosecution at Nuremberg did not see the purpose of educating the public about Nazi war crimes as a primary goal. The education would happen as a matter of course, insofar as the evidence would reveal Nazi activity that many would not be familiar with, but it would not be an ongoing concern. The court also did not see itself as offering a model for catharsis or reconciliation. Thus Nuremberg is the paradigmatic case of a conventional post-war criminal trial, one that represents a rationalistic idea of justice through its language of "staying the hand of vengeance," its dismissal of oral testimony, and its narrow understanding of the purposes of a criminal trial that highlights neither education nor social transformation.

I agree with scholars such as Lawrence Douglas, Martha Minow, and Gary Bass in my assessment that Nuremberg was largely successful at achieving its goals of setting a precedent for trying war crimes and crimes against humanity in an international court.⁷ Yet, although the Nuremberg trials offer a solid foundation for the establishment of international courts for the trial of war crimes, they relied on a schism between reason and emotion that is limiting when we consider the broader needs for justice and the psychological restoration of a society in the aftermath of war. The needs of perpetrators, victims, and bystanders to judge the actions of the past and participate in the reconstruction of society are not met by a criminal trial and could not even be articulated given the limitations on what is considered relevant testimony. Emotion, particularly the emotions of anger, despair, and resentment, could not play a prominent role in Nuremberg because of the constraints of legal procedure and the purpose of the trials. But they cannot be ignored as part of the collective needs of post-war justice; to include them would force a reconsideration of the boundary between the legitimacy of reason and emotion in public, a reconsideration that is necessary in the wake of war.

Eichmann on Trial

The trial of Adolf Eichmann remains the subject of scholarly and popular inquiry largely because of Hannah Arendt's evocative reportage. She covered the trial, which took place in Jerusalem in 1961–1962, as a correspondent for the *New Yorker* and her articles were later published as a book entitled *Eichmann in Jerusalem: A Report on the Banality of Evil*. Arendt's portrayal of Eichmann's apparent lack of malicious intent, his tendency to speak in cliché, and his utter ordinariness as a man mediocre in most every way, gave rise to a new stereotype: the bureaucratic war criminal. She described his orientation towards the crimes which he committed as banal, not the crimes themselves. Seyla Benhabib writes, "Eichmann becomes for her a paradigm case for analyzing how neither particularly evil nor particularly intelligent people could get caught in the machinery of evil and commit the deeds they did."⁸

Adolf Eichmann was apprehended by Israeli secret agents in a suburb of Buenos Aires, Argentina, his country in exile after he fled Germany and used the underground network of SS officers to start a new life under an assumed name. Eichmann was one of the most wanted Nazi fugitives of his time not because of his high rank within the party but because of his unique status as the only Nazi official specifically concerned with the deportation of Jewish people in Hungary and elsewhere. He was represented in court by Robert Servatius, a German lawyer, and faced 15 charges including multiple counts of crimes against the Jewish people, crimes against humanity, and war crimes.⁹

Unlike the strategy of the Nuremberg prosecution, Gideon Hausner, the chief prosecutor in the Eichmann case made the testimony of victims of the Holocaust the focus of the trial. One reason for this decision was the relationship he sought to establish between the trial and the legitimacy of the state of Israel. The justification for trying Eichmann in Jerusalem and not in an international tribunal, as Arendt would have preferred, stemmed from the specific claim that Israel was the nation best suited to speak in the name of the Jewish people and that their suffering needed to be remembered by the new generation in Israel and around the world who had come of age after the War. In his opening statement Hausner evokes the names of all those who died to show that his responsibility to prosecute Eichmann comes from them; he says, "When I stand before you, judges of Israel, in this court, to accuse Adolf Eichmann, I do not stand alone. Here with me at the moment stand six million prosecutors. But alas, they cannot rise to level the finger of accusation in the direction of the glass dock and cry out *J'accuse* against the man who sits there."¹⁰

The focus on the testimony of survivors, many of whom lived in Israel, highlighted the triangular relationship between Eichmann's responsibility for the Holocaust, the ongoing suffering of the Jewish people, and the legitimacy of the state of Israel. The trial thus became a central piece in the Zionist project of nation-building. The decision to bring victims was not the most efficacious to prove Eichmann's guilt, but rather it was a decision that served the interests of the Israeli government in constructing a narrative about the relationship between Jewish suffering and the Zionist *raison d'état*.

Arendt sees this logic as responsible for the imposition of an all-encompassing narrative of Jewish victimhood onto the testimony of the witnesses, with the occasional story of Zionist heroism. What she finds missing from the univocal narrative of victimhood is the complicity of the Jewish leadership, particularly in the form of the *Judenräte*, Jewish councils that cooperated with Nazi officers in the administration of Jewish communities in Germany, Poland, and elsewhere. Arendt questioned why so many members of the Jewish councils were willing to comply with Nazi demands to give up the names and residences of members of their communities when they were aware that this information would be used for the purposes

of deportation and later execution. This indictment of the Jewish leadership in Europe was a story that emerged only in small pieces throughout the trial but Arendt's emphasis and condemnation of the cooperation of the *Judenräten* is one of the most striking topics in her writings on Eichmann.¹¹

Arendt's frustration with the framing of witness testimony to bolster one narrative of Jewish suffering is part of her larger concern that the trial of Adolf Eichmann verged on becoming a show trial, a term reminiscent of the trials in the Soviet Union where guilt was pre-determined and the need to provide credible evidence was only optional. In contrast to the witnesses Arendt believed were placed on the stand to rile up emotions, she preferred the type of testimony delivered by Zivia Lubetkin Zuckerman: "The purest and clearest account came from Zivia Lubetkin Zuckerman, today a woman of perhaps forty, still very beautiful, completely free of sentimentality or self-indulgence, her facts well organized, and always quite sure of the point she wished to make."¹² Here Arendt sets up the dichotomy between well-organized facts and a coherent presentation on the one hand and sentimentality and self-indulgence on the other. The bridging of the divide between sentiment, in the form of emotions, and reason is not a possibility and Arendt equates the contributions of facts with the work of justice. Through her observations about the witnesses at the Eichmann trial we see that Arendt's preferences are aligned with the preferences of Robert Jackson and others who wanted a separation of the rational evidence of facts from the volatility of emotion in the Nuremberg trial.

No Place for Despair

If Jackson and Arendt are skeptics when it comes to the place of emotional testimony in the courtroom, Gideon Hausner, the chief prosecutor in the Eichmann trial, had an ambitious vision of how the testimony of victims could both (1) help convince the judges and the audience for the harshest punishment for Eichmann and (2) serve as a way to educate people about the Holocaust and also highlight the resiliency and strength of the Jewish people. The testimony of a survivor of the Holocaust named Leon Wells is an example of the prosecution's preferred narrative.¹³ Wells testified that while in the concentration camp he was so malnourished and maltreated that he began to hallucinate and imagined that he was forced to drink his own blood. One day he was taken with 179 other prisoners to a field to be executed. By faking his own death, he was able to escape from the site of the mass grave and tried to begin a life outside of the camp.¹⁴ This proved to be very difficult – he attempted suicide and was recaptured by the Germans and forced to work in a labor camp. In the dramatic climax of his testimony, he recalled that he was forced to dig up the grave that would have contained his own body. After hearing his story, Hausner shifted to questioning him about his life at present and asked Wells whether it was true that he had recently received an award for excellence in engineering. This was Hausner's preferred way of concluding witness testimony; he would end with an anecdote or fact that reflected the witness's triumph over a dark period in their past, a heroic moment that would show strength and resiliency.¹⁵ This tendency reveals the belief that one can see the experiences of victims as central to justice after war, but still not be comfortable with all the emotions of these experiences, particularly the emotions of intense anger and despair. By ending on a note of triumph or recognition, Hausner attempted to mitigate the most unsettling part of the testimony, the psychological pain and the existential questions that emerge from having such experiences.

The allaying of the most difficult emotions that may emerge from victim testimony is not merely a strategic choice on the part of Gideon Hausner but reflects some of the intrinsic

tensions that exist when victim testimony is included as part of criminal trials. First, for the sake of legal procedure, only certain aspects of the testimony are considered relevant for the trial. Despite Servatius' objections that the testimony of witnesses such as Wells were irrelevant because Eichmann had no contact with him nor a direct impact on his experiences, the judges allowed the testimony.¹⁶ Still, Wells' testimony had to conform to certain expectations of length and content that prohibited fully articulating the emotional and psychological impact of his time in the camps, including his hopes for what justice may entail after the Holocaust or the process of restoring his faith in the relationship between citizens after war. These questions are important to the rebuilding of society after war, they cannot be automatically deduced from formal documents or material evidence. They must emerge as part of a collective conversation in the aftermath of war and the testimony of victims during a criminal trial provides a nascent opportunity for this, but the degree to which victims can actually include the content of anger and despair in their testimony varies greatly.

Secondly, although the prosecution wanted to include both the psychological and physical suffering of the victims as part of its larger strategy to attribute accountability to Eichmann and legitimacy to the state of Israel, there is a fragile line between the emotions that are worthy of sympathy and those that are either self-indulgent or too difficult to understand. When sympathy is defined as a "(real or supposed) affinity between certain things, by virtue of which they are similarly or correspondingly affected by the same influence, affect or influence one another, or attract or tend towards each other," the ability to see similarities between the victim and oneself becomes a prerequisite and this varies not only with the intensity of the experience but also with the way in which it is expressed.¹⁷ The expression of tears, while indicative of vulnerability and a reason for human solidarity, may feel unnecessarily dramatic and difficult to comprehend in the context of a trial. The witness who appears to have triumphed over the difficult experiences of her past through career success or having raised a family makes for a worthy object of sympathy. If, instead of triumph, we are confronted with feelings of despair and bitterness, it is much more difficult to listen to the testimony in a sympathetic way. Hausner was aware of this and Douglas notes that the structure of Hausner's questions "had the consequence of conventionalizing [them], in so doing, containing [the testimonies'] deeper, bleaker aspects."¹⁸ The despair of a witness on the stand, such as the feeling that life is ultimately meaningless, leaves the judges, attorneys, and the audience of the trial in a difficult position. The case of Eichmann represents how the emotions of anger and despair can only be voiced in a moderate way in the context of criminal trials. For victims to be truly allowed the freedom to express the contradictory, often unsettling emotions they experience or have experienced in the past, we need a different type of institution for transitional justice, one that can have a broader scope than is justified in the criminal prosecution of a defendant. Truth commissions provide one such model.

Shklar's Legalism

While Arendt was covering the Eichmann trial Judith Shklar was also writing about political trials and the theory of law in her book, *Legalism*. In it she provides a critique of the narrow and rationalistic ideology that permeates legal theory in the academy and which results in it closing law off from questions of history, politics, and ethics. Although the contemporaneous nature of the two works prevented Arendt and Shklar from directly responding to each other, they are engaging with the same topics, at the same point in history, with certain similar orientations towards the project of liberalism. Both maintained strong, although not uncritical, positions for liberal democracy as the best option for government, when other left-leaning academic

colleagues were exploring socialism and communism as alternative systems. Both considered the liberal paradigm to be dependent on individual autonomy and were skeptical of ambitious state endeavors that interfere with such autonomy. Shklar and Arendt differed when it came to the legal ideology that permeates liberalism, the ideology Shklar called "legalism" and described as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."¹⁹ Instead of these characteristics, Shklar advocated an approach to law "as an historical phenomenon" and she wanted to "replace the sterile game of defining law, morals, and politics in order to separate them as concepts both 'pure' and empty, divorced from each other and from their common historical past and contemporary setting."²⁰ Legalism is an ideology, a set of beliefs held by a group of people, and Shklar was particularly critical of those who presented it as a natural extension of universalizable logical and deductive thought rather than acknowledging the force it gained through ideological affiliation.

With her critique of legalism in the background, Shklar turned her attention to the Nuremberg trial and saw the potential for it as the paradigmatic case of the flaws of legalism. By constructing a framework for international law and charges such as "crimes against humanity," the legal community of the Allied countries assumed that their work would lead to the creation of a new set of norms, regardless of historical and political context. She was critical of the lack of institutional infrastructure that would help establish the legality of international law but she did not think such institutions could ever be entirely effective.

Despite these criticisms, Shklar was ultimately in favor of the Nuremberg trials largely because the context of a devastated German bureaucratic and legal structure meant that the trial could set a precedent for reconstruction. Implicit in her support of the pedagogic function of the trials was her endorsement of the type of rationality, as distinct from emotion, that was highlighted at the trials. For all of her critiques about legalism, she did not challenge the fundamental assumption that emotions would be disruptive to rule-following and hence, justice, a dichotomy I take to be untenable given the justice that is required after war. She wanted to see more scholarship examining the formal legal rules (that legalism purports to live by) and the political realities that allow those rules to be enforced. In this way she was in agreement with the legal realists who were gaining influence in law schools during the 1950s with their view that the law must take into account the realities of power and practice not just ideal jurisprudence. Shklar's view, along with that of legal realists, advocated a new approach to rationality, one that was more inductive and emergent from the facts at hand, but it did not question the premise that emotion should be excluded from the deductive rationality of legalism and from the inductive rationality that comes out of an attention to history and politics.

Her endorsement of Nuremberg, offered begrudgingly at times, is clearly part of a larger dialogue between Shklar and her American colleagues about anti-Communism and domestic political trials, such as those of Alger Hiss and the Rosenbergs which took place in the early 1950s. Such trials are premised on the elimination of political enemies and not beholden to the standards of evidence and procedure as the constitutionally based US legal system would require. Within totalitarian regimes, the method of using courts to achieve political ends is consistent with the logic of political order orchestrated from above, but within a liberal regime Shklar was adamant that these trials, whether others acknowledge them as political trials or not, were highly destructive. Thus, her positive position on Nuremberg, despite the fact that it was deeply rooted in the flaws of legalism, evolved out of a comparison to what it could have been: an international version of a political witch hunt and one that could undermine future attempts at international justice. She applauded the fact that the trials at Nuremberg

did not collapse into such a spectacle. Without a framework for understanding why victim testimony could be helpful either to victims or to society more generally, Shklar can only conceive of the misuse of testimony for the purposes of political trials.

Arendt contra Shklar

Arendt did not take as critical a stance towards the limitations of a legalism as did Shklar does; to the contrary, it often seems that Arendt wished the Eichmann trial was more legalistic in Shklar's sense of the term. Arendt, largely because of the central role of oral testimony in the Eichmann case, consistently advocated for the type of rule-based justice that is premised on strict categorization and application. A deductive approach to the application of the idea of crimes against the Jewish people and of waging an aggressive war was not troubling to her, neither was the charge of crimes against humanity, a charge that Shklar found spurious because it lacked precedent. Arendt was also less committed to the pedagogic function of the trial. Nowhere does she say that Israel needed the trial to reinvigorate its own legal system or provide a prototype for the judicial process in the future. Rather the connection between the trial and nation-building *writ large* was a source of concern for Arendt.

Arendt's preference for a more legalistic approach to the trial and her skepticism about the role of victims as witnesses closely paralleled her expectations of journalistic writing. While covering the trial for *The New Yorker* she had the liberty of writing editorial pieces but throughout her coverage, it is evident that she wanted to situate herself as a rational and detached observer who was much less motivated by vengeance and retribution than were other members of the audience and the Israeli prosecution. Although she attempted to approach the trial as a detached observer, this was much more difficult for her to do in this context than in any other of her works. Arendt wrote, "To a Jew this role of the Jewish leaders in the destruction of their own people is undoubtedly the darkest chapter of the whole dark story. It had been known about before, but it has now been exposed for the first time in all its pathetic and sordid detail."²¹ The shift in tone that accompanied her reporting on the actions of the Jewish councils, and her willingness to challenge the master narrative of Jewish victimhood and Zionist salvation which underwrote the trial reveals the impossibility of separating fact from emotion. Her own identity as a Jew, her complex feelings about having survived the Holocaust but leaving Europe as the cost of survival, and her status as an intellectual all influence her reportage.

The Role of Emotion in Victim Testimony

When Arendt wrote that "As witness followed witness and horror was piled upon horror, they sat there and listened in public to stories they would hardly have been able to endure in private," she uncovered one of the most disturbing aspects of the inclusion of emotion in the legal process – the renegotiation of public and private.²² Although Arendt was not comfortable with this process, it is my position that it is a necessary part of transitional justice and the cost of addressing the political and psychological legacy of war. With war, and the suffering that accompanies it, one can no longer pretend that one's private world is protected from the intervention of the public world and the state. Not only are traditional private concerns such as those relating to the body, sexuality, and family disrupted by war, one's very right to life has been questioned by the public concerns directed by the state. Allowing victims to testify about their private lives, including their experiences of suffering,

possibly the most private of private concerns, is one way to acknowledge the collapse of the public/private distinction in the wake of war.

Arendt's observation about the banality of Eichmann's attitude towards the crimes he committed along with her distaste for the inclusion of emotions in the trial leads to a paradox within her writings. This is the paradox of the authenticity of emotions displayed in public, particularly the authenticity of the emotions of the perpetrator. Eichmann's defense was based on his commitment to following orders and bearing the responsibility for the ends of the orders that he was contractually bound to administer. As such he framed his attitude towards the goals of the Third Reich as a duty to be undertaken without passion; detached indifference was his overriding tone throughout the trial. Arendt notices this and is somewhat shocked by his utter lack of creativity, personality, and inability to see things from another's point of view. Yet, as mentioned above, she indicates that she would have been no more convinced by words of contrition and hopes for forgiveness.

The obstacles and limitations on victim testimony in the Eichmann trial are understandable given its status as a trial with the purpose of holding Adolf Eichmann responsible for crimes against humanity, among other charges. By studying the points of tension between the victim testimony and the legal goals of the trial, the need for an alternative framework during the process of transitional justice emerges.

The Eichmann Trial as the Gateway to Emotions in Transitional Justice

Whereas the trials at Nuremberg were built on material evidence and a dispassionate case for the guilt of Nazi officers, the Eichmann trial had a much larger role for victim testimony as part of its goal of teaching about the Holocaust and establishing the legitimacy of Israel. The emphasis on victim testimony during the Eichmann trial laid the foundation for new approaches to considering justice in the period after war and has made an impact far beyond the scope of the Holocaust. Truth commissions are part of this legacy and they have been premised on the idea that the testimony of victims can serve as a way to educate the public about the experiences of war, and also provide a place for victims to renegotiate their reentry into society. Truth commissions, by virtue of being outside set legal codes and not primarily concerned with the prosecution of individuals, have much more freedom in constructing the role of victim testimony.²³ It is interesting to note that the German philosopher Karl Jaspers, in his reflections on Eichmann, prefigured the idea of a commission solely in charge of gathering facts. In a letter to Hannah Arendt, his former doctoral student and close friend, he wrote, "I have already stated my view that this trial is wrongly conceived at its very root. Now I have this foolishly simplistic idea: It would be wonderful to do without the trial altogether and make it instead into a process of examination and clarification. The goal would be the best possible objectification of the historical facts. The end result would not be the judges' sentence, but certainty about the facts, to the extent such certainty can be attained."¹⁹ Although he sees the possibility for this type of commission to contribute to a different approach to justice than what is offered with the Eichmann trial, I disagree with Jaspers on how extralegal institutions can and should contribute to justice. He would seem to be content with more "facts," I would argue for greater attention to the psychological consequences of war as seen through the emotions of anger, despair, and resentment.

Without the burden of having to remain relevant to conventional legal proceedings or the actions of a defendant, the type of testimony that is admissible in a truth commission is much broader than would be the case in a trial. Specifically there is much more room for emotional reflections on past actions and the psychological legacy of trauma without the

more stringent requirements of legal testimony. The great significance of truth commissions lies in their potential to achieve two important goals of transitional justice: (1) they can allow victims, perpetrators, and bystanders to fully communicate their emotions, particularly those of anger, resentment, and despair, and (2) they focus on the reconstitution of the public world and political community. These two goals are closely connected because it is only through an authentic confrontation with the emotions that are present after war that a political community can begin to articulate its guiding value.

The South African Truth and Reconciliation Commission

The case of the South African Truth and Reconciliation Commission (TRC) is a paradigmatic case of the centrality of victim testimony in the context of a truth commission. From 1996–1998, thousands of South Africans testified as part of the Human Rights Hearings of the TRC. Under the leadership of Desmond Tutu, thousands spoke about their experiences under apartheid, and came from many different backgrounds including activists, security guards and students. They spoke about the deaths of loved ones and the feeling of living in constant fear of violence. Many wanted to find out the details about how a family member had died so that there could be a proper burial. Those seeking amnesty for political crimes committed during the apartheid era took part in a separate process, the human rights hearings were not connected to any criminal charges or investigations. The hearings were covered on national television everyday and also received significant international coverage. A weekly program hosted by Max Du Preez covering the events of the TRC that week was one of the most watched television series in South African history. By all accounts, the testimony of victims at the TRC was the center of a national drama and one of the strongest images of the transition from apartheid to the new democratic republic of South Africa.²⁴

The leadership of Archbishop Tutu was crucial to the public image of the TRC because of the widespread respect he had earned across different religious communities within and outside of South Africa. He often made the final comment at the end of a hearing, providing a type of response from the Commission after a witness had given testimony. He thanked them for telling the Commission what happened, commended them for their courage, and shared personal observations. As opposed to acting as an attorney who elicits testimony for the sake of establishing guilt, or a judge who must maintain the rule of order and impartiality, Tutu was able to have the authority of a judge but could be an empathetic ally of those who took the stand. Each witness was provided with an advocate who would be familiar with the witnesses' experiences of violence, sit next to her during the testimony, and facilitate the debriefing process afterwards. Again, in a way that would have been impossible given the demands of a criminal trial, witnesses were given attention because the act of testifying was seen as a thing-in-itself, not just another part of an expanding case against perpetrators.

Conclusion

The Nuremberg trials were an attempt to create a legal arena for crimes that transcended any one nation; the unprecedented nature of the crimes and the charges (crimes against humanity) meant that attention to legal procedure was important to provide the trial with a semblance of legitimacy. The judges and prosecutors wanted to ensure that they were not arbitrarily meting out victors' justice without attending to the requirements of objectivity and rationality and decided to forego victim testimony almost entirely.

Yet, the Eichmann trial, through its willingness to let victims take the stand, initiated a new trajectory in transitional justice. This trajectory posits justice as a concept that goes beyond accountability and punishment in order to include the emotions of victims and the legacy of suffering that affects entire societies after war, not just perpetrators and victims. The concept of victim testimony, the potential of individual narratives to educate, empower, and hold others accountable, was borne out of the Eichmann trial and is now a central part of many truth commissions, institutions of transitional justice that are broadening the parameters of justice after war. In the most well known example, the South African Truth and Reconciliation Commission invited thousands of victims and perpetrators to come forward and speak about their experiences during apartheid. Their testimonies were meant to be part of the collective history of apartheid and to help lay the foundation for a multiracial democratic nation.

The connection between the centrality of individual testimony and the reformulation of political community relies upon the reformulation of political values after all the previously held values of a society are destroyed through the violence and cruelty of war. Through testimony, individuals have the chance to contribute to the collective historical record and to reflect on the psychological and material legacy of the violence in their lives, including the presence of anger, resentment, and despair. These emotions are inherently unsettling and difficult to listen to within a political context but they are part of the reality of war and the transitional period that follows. Political and institutional changes after war will not lead to a thriving civil and political culture unless the underlying emotions are acknowledged and this acknowledgment entails a reconsideration of the strict boundary between rational truth and emotion. I have argued that the boundary between what can be considered "rational" and what is "emotional" cannot be definitively decided. The boundary is porous because of the experiences of war and trauma themselves. These experiences cannot be easily recorded as objective facts nor translated into purely rational language. Neither are they experiences that only exist within individual psychology with no impact on society or politics after war. The anger and despair of victims permeate citizen relationships and perceptions of government after war. They may also hold insights into why individuals may be opting out of political participation, as well as other information that would be valuable for rebuilding political life. In order to be open to the cognitive information the testimonies may hold, the commissioners and the public must be willing to listen to a wide range of observations and emotions and consider this information to be part of the process of justice. Understanding the events of war and their ongoing impact on society requires attention to both the factual and emotional aspects of testimony; both are part of a truly rational understanding of the legacy of war.

Similarly, the idea that pain can only be acknowledged in the private sphere and is not suitable for public discussion is challenged by the phenomenon of victim testimony. After war we cannot be afraid of the inclusion of private concerns in the public realm, especially those of the body and pain as well as the private concerns of individual ethical worldviews. Anger and despair in victim testimony often reflect a grappling with ethical ideals and questions of meaning, and in a less direct way, a grappling with the broader ideas of politics, progress, and a reason for hope in the future. These testimonies are the beginning of the conversation about what values and practices are necessary for political life after war. Both the tone and the content of victim testimonies can contribute to a fuller understanding of the legacy of war.

Although they have great potential, I acknowledge that victim testimony in the context of truth commissions may be susceptible to coercive narratives that are meant to bolster the legitimacy of the state. The structure of the testimonies may also have the effect of limiting the full range of emotions that emerge in the aftermath of mass violence. Such limitations

would hamper the impact that testimonies could have on understanding of justice and the restoration of political life. These concerns are not reasons to disregard the possibilities of truth commissions, but must be considered in their formulation and administration.

When the binaries of reason versus emotion, and public versus private break, there is a singular opportunity to reconsider the meaning of justice as a process of reconstituting citizen relationships and a belief in the ethical potential of the state. The articulation of anger and despair may verge on nihilism, a feeling of complete meaninglessness that could challenge the legitimacy of the state and the truth commission itself. The confrontation with anger and despair may seem like a moment of uncertainty, but it holds the promise of political transformation because it is the catalyst for a more authentic discussion about the legacy of war.

NOTES

1. Hannah Arendt uses the term “cheap sentimentality” to refer to what she sees as misplaced expressions of guilt among German youth after World War II. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1994), 251.
2. Antjie Krog, *Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa*, (New York: Times Books, 1998), 32.
3. Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2001), 42.
4. Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press), 22.
5. Nuremberg Trial Proceedings Vol. 1, Indictment: Count One, Count Two, Count Three, Count Four. The Avalon Project at Yale Law School. <http://www.yale.edu/lawweb/avalong/int/proc/count1.htm>. (Accessed January 19, 2008).
6. Antjie Krog, *Country of My Skull*, 64; Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998); Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000).
7. Seyla Benhabib, “Arendt’s Eichmann in Jerusalem,” *Cambridge Companion to Hannah Arendt* (Cambridge: Cambridge University Press, 2003), 68.
8. *Ibid.*, 260.
9. Arendt, *Eichmann in Jerusalem*, 21.
10. With her criticism of Jewish cooperation with the Nazis, Arendt stumbled upon the highly controversial topic of Rudolf Kastner, the most prominent Jewish negotiator with the Nazis (including Eichmann). After the war he was given a high position in the Israeli government but when it was revealed that he had been a collaborator, Kastner said he was a victim of slander and pressed charges. He was murdered in 1957 in retribution. Arendt implies that the Israeli secret police was implicated in the murder. Hannah Arendt et al., *Hannah Arendt, Karl Jaspers: Correspondence, 1926–1969* (New York: Harcourt Brace Jovanovich, 1992), 510.
11. *Ibid.*
12. Douglas, *The Memory of Judgment*, 127.
13. Leon W. Lilian Sicular, and Phyllis O. Ziman Tobin, *Leon W. Holocaust Testimony (Hvt-788) November 15, 1986* (New York, NY: Video Archive for Holocaust Testimonies at Yale, 1986), video recording. Accessed July 11, 2006.
14. Douglas, *The Memory of Judgment*, 127.
15. See Douglas, *The Memory of Judgment*, 138 for exchange with judges.
16. *Oxford English Dictionary*, online, accessed through Yale University, June 29, 2006.
17. Douglas, *The Memory of Judgment*, 127.
18. Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1986), 1.
19. *Ibid.*, 3.
20. Hannah Arendt, *Eichmann in Jerusalem*, 242.

21. Ibid., 8.

22. Although Truth Commissions may, like in the case of *Nunca Mas* in Argentina, use facts that are gathered for Truth Commissions to later criminally prosecute individuals.

23. Arendt and Jaspers, *Hannah Arendt/Karl Jaspers*, 413.

24. Hayner, *Unspeakable Truths*, 41-42; James Gibson, *Overcoming Apartheid. Can Truth Reconcile a Divided Nation?* (New York: Russell Sage Foundation, 2004); Audrey R. Chapman and Hugo van de Merwe, eds., *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (Philadelphia: University of Pennsylvania Press, 2008).

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